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IN THE

# Supreme Court of the United States

ELIJAH MANUEL,

*Petitioner,*

v.

CITY OF JOLIET ET AL.,

*Respondents.*

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

When the police arrest someone without a warrant, there are two distinct periods of pretrial detention that may follow: (1) the day or two between the arrest and the initiation of legal process; and (2) the weeks or months between the initiation of legal process and dismissal or trial. This case is about the second period of time. Petitioner contends his Fourth Amendment rights were violated because he was unreasonably incarcerated between the initiation of legal process and the dismissal of the charges against him. Petr. Br. 13; J.A. 79.

Respondents argue this claim must be dismissed because petitioner calls it a "malicious prosecution" claim, and the Fourth Amendment does not embrace every element of the common-law tort of malicious prosecution. But the label "malicious prosecution" is just "shorthand." *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996); *see also* Petr. Br. 13. This Court has used the phrase "Fourth Amendment malicious-prosecution suit" to reference a claim under 42 U.S.C. § 1983 alleging "unlawful detention" after the "wrongful institution of legal process." *Wallace v. Kato*, 549 U.S. 384, 390 & n.2 (2007) (emphasis omitted); *see also Albright v. Oliver*, 510 U.S. 266, 270 n.4, 275 (1994) (plurality opinion). That is what petitioner alleges.

In other words, the label "malicious prosecution" simply differentiates a claim covering the second time period described above (pretrial detention *following* legal process) from a claim involving the first period (detention *preceding* legal process)—the latter of which is sometimes called "false arrest" or "false imprisonment." *See Wallace*, 549 U.S. at 388-

90. The label also dictates when a claim accrues because claims under Section 1983 accrue when their closest common-law counterpart would have. *See id.* But labeling a Fourth Amendment claim covering the second period of time as a "malicious prosecution" claim does not require the Fourth Amendment itself to encompass every element of the common-law tort of malicious prosecution.

Once the relevance of labeling is clarified, this case becomes straightforward. A plaintiff bringing a claim under Section 1983 must do two distinct things: (1) allege a cognizable constitutional violation; and (2) satisfy any additional statutory requirement Section 1983 imposes. Petitioner does both. First, he alleges a violation of the Fourth Amendment inasmuch as he was detained without probable cause to believe he committed any crime for forty-eight days between his first appearance and the dismissal of the State's baseless charges. Second, petitioner has satisfied Section 1983's statutory requirement that plaintiffs challenging detention imposed pursuant to legal process show that "criminal proceedings have terminated in [their] favor." *Heck v. Humphrey*, 512 U.S. 477, 489 (1994); *see also Albright*, 510 U.S. at 280 (Ginsburg, J., concurring). Petitioner alleges such termination, and he filed his complaint within the applicable limitations period of that occurrence.

It is irrelevant whether the Due Process Clause under these circumstances also provides some basis for recovery. Petitioner has alleged a cognizable Fourth Amendment claim. If it did matter, though, the Fourth Amendment is a better fit for the harms at issue here and thus would trump.

## ARGUMENT

For all of respondents' talk about timeliness, this case is simply about whether the Fourth Amendment supports a claim under Section 1983 for unlawful detention between the initiation of legal process and dismissal. If so, then the court of appeals must be reversed and this case must be allowed to proceed. If not, then petitioner's Fourth Amendment "malicious prosecution" claim would have had to be dismissed regardless of when it was filed. For the reasons petitioner now explains, the Fourth Amendment supports petitioner's claim.

### I. The Fourth Amendment Supports "Malicious Prosecution" Claims Arising from Pretrial Detention

The Fourth Amendment, by its plain terms, applies to detentions between the initiation of legal process and trial. And nothing about the relationship between a Fourth Amendment claim based on such a detention and the common-law tort of malicious prosecution precludes petitioner from seeking relief here under Section 1983.

#### A. The Fourth Amendment's Protections Do Not Evaporate During the Period Between the Initiation of Legal Process and Trial

Respondents advance two reasons why the Fourth Amendment purportedly does not apply to detentions between the initiation of legal process and trial. First, respondents assert that a "seizure" is a discrete act, which ends "no later than when the *Gerstein* hearing blesses it." Resp. Br. 30. Second, respondents contend that even if a detainee continues

to be "seized" after a *Gerstein* hearing, the continued pretrial seizure does not implicate the Fourth Amendment because it "is due to the prosecution, rather than the initial arrest and probable-cause finding." Resp. Br. 38. Neither argument withstands scrutiny.

1. This Court has made clear that a person is seized whenever "his freedom of movement is restrained" such that he is "not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (plurality opinion); *accord Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). It is thus self-evident that when a person is kept in a jail cell, he is seized.

Quoting *California v. Hodari D.*, 499 U.S. 621, 625 (1991), respondents protest that a seizure accompanying an arrest is necessarily "a single act, and not a continuous fact." Resp. Br. 30. But nothing in *Hodari D.* indicates that an incarcerated person at some point ceases to be seized. The Court there simply observed that a person who flees police custody is not seized "during the period of fugitivity." 499 U.S. at 625. When, by contrast, a person remains "within physical control" of the authorities (detained in a jail cell or otherwise), *Hodari D.* confirms the person is seized. *Id.* at 624; *see also id.* at 627-28 (reaffirming *Mendenhall* test).

No other conception of the term "seizure" would make sense. "The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion); *see also Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975) (Fourth Amendment governs "the detention of suspects pending trial"). The Amendment could not

accomplish that objective if only the first day or two of pretrial confinement were subject to its regulation. The purpose of a *Gerstein* finding, in other words, is to govern the legality of an "extended" pretrial detention going forward, not to retroactively assess the legality of a warrantless arrest. *Gerstein*, 420 U.S. at 114; *see also id.* at 127 (Stewart, J., concurring) (*Gerstein* "does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person" pending trial).

Nor could the Fourth Amendment serve its goal of steering officers toward securing warrants before arrests if it applied in the context of warrantless arrests only for the day or two before legal process commenced. This Court noted in *Wallace v. Kato*, 549 U.S. 384, 389 (2007), that the issuance of a warrant initiates "legal process." And under *Malley v. Briggs*, 475 U.S. 335 (1986), the Fourth Amendment governs pretrial detentions (which can last weeks or months) following the initiation of that legal process. The Fourth Amendment should apply no differently when arrest *precedes* the initiation of legal process. If anything, the Fourth Amendment's protections are more important in that context. *See* Petr. Br. 24-25; Albert W. Alschuler Br. 26-30, 34-35.

Respondents' only rejoinder is an assertion that *Wallace*, in actuality, "did not equate issuance of an arrest warrant with the start of legal process." Resp. Br. 49 n.11. But *Wallace* speaks for itself. It noted that the case involved detention "*without legal process* in January 1994. [The police] did not have a warrant for [Wallace's] arrest." 549 U.S. at 389; *see also Cook v. Hart*, 146 U.S. 183, 191 (1892) (discussing an arrest "without warrant or other legal

process"). There is no denying, therefore, that a demonstration of probable cause to a magistrate in the context of a warrant application constitutes the initiation of legal process. And that being so, the same must be true of a demonstration of probable cause to a magistrate in the context of a *Gerstein* hearing. *See, e.g.*, *Wilkins v. DeReyes*, 528 F.3d 790, 798-99 (10th Cir. 2008).

2. Respondents' alternative argument for why the Fourth Amendment's protections evaporate after the initiation of legal process fares no better. Respondents maintain that even if a detainee remains "seized" following the initiation of legal process, "[t]he defendant remains detained only because the prosecution continues." Resp. Br. 38.

Insofar as this is a causation argument, petitioner has already explained why the argument does not render the Fourth Amendment inapplicable and lacks merit in any event. Petr. Br. 23-24. In short, a judicial finding of probable cause does not "break[] the causal chain" between a police officer's misrepresentations and the defendant's detention. *Malley*, 475 U.S. at 344 n.7. Officers are responsible under Section 1983 "for the natural consequences of [their] actions." *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). And because *Gerstein* findings in Will County and elsewhere are made in nonadversarial proceedings that typically turn entirely on police officers' renditions of the facts, *see* Petr. Br. 20-21; Resp. Br. 50-51, it naturally follows that making misrepresentations in connection with

such proceedings will result in suspects being wrongfully detained, *see* Petr. Br. 23-24.[1]

Insofar as respondents suggest that when a pretrial detainee's "initial seizure is not at issue, there is no Fourth Amendment right to be released" when probable cause is lacking, Resp. Br. 36, they are equally mistaken. Respondents contend *Baker v. McCollan*, 443 U.S. 137 (1979), "recognized this principle." Resp. Br. 37. But *Baker* holds nothing of the sort. The Court there merely concluded that once a person is jailed pending trial based on a *proper and accurate* demonstration of probable cause to a magistrate, the Fourth Amendment requires nothing more. *Baker*, 443 U.S. at 143-46. The Court said nothing about the situation here: detention following an *illegitimate* demonstration of probable cause. In this situation, the Fourth Amendment requires the detainee to be "discharged from custody," for there is no basis for holding him. *Gerstein*, 420 U.S. at 115.

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[1] The National District Attorney's Association (NDAA) contends that findings at preliminary hearings should cut off officer liability because such hearings "are fully adversarial, generally allowing the defendant to cross-examine the prosecution's witnesses and to put on his own." NDAA Br. 17. But as the Solicitor General explains, such enhanced pretrial hearings do not necessarily sever the "causal link" connecting an officer's malfeasance and a defendant's continued detention. U.S. Br. 14-16. At any rate, no such hearing was held here. The only hearing held between petitioner's *Gerstein* hearing and his release was the grand jury proceeding. As petitioner has explained (and respondents do not dispute), this proceeding was not meaningfully different than the *Gerstein* hearing. *See* Petr. Br. 5, 24 n.8.

Respondents protest that treating the Fourth Amendment as applicable throughout the pretrial process "proves far too much" because it implies that the Fourth Amendment continues to apply beyond conviction as well. Resp. Br. 40. But the situation following a conviction is markedly different. While defendants who are convicted may remain seized, their convictions—supported, as they must be, by findings beyond a reasonable doubt—render the seizures indisputably valid so long as the convictions are in place. Put another way, "the umbrella of the Fourth Amendment, broad and powerful as it is, casts its protections solely over the *pretrial* events of a prosecution." *Castellano v. Fragozo*, 352 F.3d 939, 959 (5th Cir. 2003) (en banc) (emphasis added).

### B. The Common-Law Elements of Malicious Prosecution Do Not Stand in the Way of Applying the Fourth Amendment to Pretrial Detention

Respondents next argue the Fourth Amendment cannot support petitioner's claim "because favorable termination and malice, two of the four common-law elements [of a malicious prosecution claim], are irreconcilable with bedrock Fourth Amendment law." Resp. Br. 19. Respondents are correct that the Fourth Amendment itself imposes neither element here. But respondents overlook that Section 1983—the statutory platform for petitioner's claim—imposes the favorable termination requirement. And Section 1983's requirement that a plaintiff overcome any assertion of qualified immunity operates much like the common-law element of malice.

1. As the United States and several courts of appeals have explained, Section 1983 requires a

plaintiff bringing a Fourth Amendment claim alleging unreasonable pretrial detention to prove that the criminal prosecution giving rise to the detention was resolved in the plaintiff's favor. U.S. Br. 19 & n.13, 24 n.16; *Sykes v. Anderson*, 625 F.3d 294, 309 (6th Cir. 2010); *Lambert v. Williams*, 223 F.3d 257, 262 & n.3 (4th Cir. 2000); *Whiting v. Traylor*, 85 F.3d 581, 585-86 (11th Cir. 1996); *see also Albright*, 510 U.S. at 280 (Ginsburg, J., concurring).

Section 1983 requires courts to borrow accrual rules from the common-law tort that provides the "closest analogy" to the constitutional claim at issue. *Wallace*, 549 U.S. at 388 (quoting *Heck v. Humphrey*, 512 U.S. 477, 484 (1994)). In *Wallace*, this Court explained that a claim, as here, for unlawful detention between the initiation of legal process and trial most closely resembles the "tort of malicious prosecution." *Id.* at 390. After all, when the pretrial detention was condoned through legal process, a challenge to detention is tied to the legitimacy of the prosecution. And "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484.

Respondents point to a different passage in *Wallace* they say dictates that the favorable termination prerequisite to bringing a Section 1983 claim "applies only in the face of 'an outstanding criminal judgment'" of conviction—a holding that would exclude any claim involving pretrial detention. Resp. Br. 23 (quoting *Wallace*, 549 U.S. at 393 (internal quotation marks omitted)). But that part of *Wallace* concerned whether to extend a favorable termination requirement to claims that the police

wrongfully detained the plaintiff *before* the initiation of any legal process. *Wallace*, 549 U.S. at 393-94. The closest tort analogy to such claims is false imprisonment, not malicious prosecution. *Id.* at 389. And the tort of false imprisonment does not have a favorable termination element; indeed, a false imprisonment claim can be brought regardless of whether a state criminal prosecution ever occurs. *Id.* at 393.[2] Fourth Amendment false imprisonment claims are thus "entirely distinct" from claims, as here, for wrongful detention *following* the initiation of legal process—claims *Wallace* itself characterized as "malicious prosecution" claims. *Id.* at 390 (quotation marks and citation omitted).

Even if the question whether the favorable termination rule applies to Section 1983 claims challenging pretrial detention following the initiation of legal process were an open one, there would be every reason to apply the rule here. In *Heck*, this Court reaffirmed that Section 1983 cannot be used directly to challenge "the fact or duration" of confinement due to a criminal conviction; only criminal appeals or habeas petitions may do that. 512 U.S. at 481 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973)). *Heck* thus held that even when a Section 1983 plaintiff seeks only damages, a showing of favorable termination is necessary to "avoid[] parallel litigation" and potentially "conflicting resolutions" over the issue of guilt. *Id.* at

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[2] The same is true with respect to a claim for "an allegedly unreasonable search," *Heck*, 512 U.S. at 487 n.7—the other type of claim respondents unsuccessfully try to compare to this case. *See* Resp. Br. 22-24.

484 (quotation marks and citation omitted). The favorable termination element also restricts lawsuits alleging unlawful confinement imposed pursuant to legal process to those where there is no valid conviction—and, thus, to cases with claimants potentially deserving of recovering damages. *Id.*

The same reasoning applies here. This Court has already held that a detainee cannot use Section 1983 directly to seek relief from "imprison[ment] prior to trial on account of a defective indictment against him." *Preiser*, 411 U.S. at 486. If plaintiffs could bring Section 1983 damages claims asserting unreasonable pretrial detention while underlying criminal prosecutions were still underway, federal courts would similarly have to assess whether state courts in those pending cases had properly found probable cause. If the federal court were to find probable cause lacking, it would thereby call the ongoing detentions—indeed, the viability of ongoing state prosecutions themselves—into doubt. This would create significant federal/state friction. Furthermore, a Section 1983 suit challenging pretrial confinement in the face of a subsequent conviction would contravene the common-law rule that a conviction is "conclusive of probable cause." Thomas Cooley, Law of Torts 185 (1879); *see also* Stuart M. Speiser et al., 8 The American Law of Torts § 28:5, at 24 (1991) ("[A] conviction is sufficient to negate the element of a lack of probable cause.").

Respondents lastly argue that applying the common law's favorable termination rule here would "*under-serve* the Fourth Amendment's protections" because individuals detained pursuant to legal process without probable cause "should be able to

recover for Fourth Amendment violations, regardless of whether they are ultimately convicted of a crime." Resp. Br. 24. Petitioner was not convicted of any crime related to the charges here, and respondents point to no other case that has ever been brought along the lines they describe. So there is no good reason for this Court to opine regarding the availability of any Section 1983 suit in that hypothetical situation.

At any rate, it is questionable whether any such suit would lie. It is an "established rule" that once convicted at trial, an illegal pretrial detention becomes constitutionally irrelevant—at least for purposes of seeking relief from the conviction. *Gerstein*, 420 U.S. at 119 (citing *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886)). And as noted earlier, the common law at the time Section 1983 was enacted withheld any remedy in this situation as well. *See supra* at 11. Accordingly, this Court would be on solid ground holding in a future case that a person convicted of a crime may not bring a Fourth Amendment claim under Section 1983 for unlawful pretrial detention unless his conviction has been overturned.[3]

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[3] If, however, this Court wished to construe Section 1983 to permit the recovery of damages where the common law would have prevented it, that pathway would be open too. The Court could suspend the favorable termination rule in a case (if ever brought) where the plaintiff conceded that evidence introduced at trial beyond that which allegedly supported his pretrial detention validated his conviction. In that scenario, a holding that probable cause was lacking before trial would not impugn the conviction. *Cf. Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

2. Respondents and amici on both sides are correct that a plaintiff bringing a Fourth Amendment claim for unreasonable pretrial detention need not allege malice. Malice, or improper purpose, is a subjective concept generally alien to this Court's Fourth Amendment jurisprudence. *See* Resp. Br. 26-27; NACDL Br. 21-23; Illinois Br. 8-10. But that fact has no import here. It is well settled that a constitutional tort need not incorporate every element of a common-law tort. *See, e.g., Rehberg v. Paulk*, 132 S. Ct. 1497, 1504-05 (2012); *Wilson v. Garcia*, 471 U.S. 261, 271-72 (1985).

The Solicitor General nevertheless maintains that a plaintiff in petitioner's position must prove the related fact that "the defendant officers acted with intent to deceive or with reckless disregard for the absence of probable cause." U.S. Br. 25. The Government says this requirement springs not from the common law but rather from *Franks v. Delaware*, 438 U.S. 154 (1978). *See* U.S. Br. 27-29. But *Franks* derived its bad faith requirement from the dictates of the exclusionary rule, which concern not whether the Fourth Amendment was violated but whether "a Fourth Amendment violation has been substantial and deliberate." 438 U.S. at 165, 171; *see also, e.g., Utah v. Strieff*, 136 S. Ct. 2056, 2062 (2016) (exclusionary rule turns on "purpose and flagrancy of the official misconduct" (quoting *Brown v. Illinois*, 422 U.S. 590, 604 (1975))); *Davis v. United States*, 564 U.S. 229, 236-39 (2011) (stressing that test for applying exclusionary rule is much more stringent than whether Fourth Amendment itself was violated). The exclusionary rule is obviously not in play in Section 1983 litigation. That is why this Court in *Malley*—while holding that the Fourth

Amendment supports claims under Section 1983 for unlawful detention imposed pursuant to legal process in the form of arrest warrants—made no mention of *Franks*. *See Malley*, 475 U.S. at 345.[4]

All that said, the absence of any requirement that a Section 1983 plaintiff challenging his pretrial detention under the Fourth Amendment prove malice or bad faith will not make much practical difference in the mine run of cases—and certainly makes no difference here. That is because Section 1983 requires plaintiffs in these Fourth Amendment cases—as in all other cases against police officers—to overcome any assertion of qualified immunity. *See* NACDL Br. 18-19. To do so, plaintiffs must show that "no reasonably competent officer would have concluded" that probable cause existed. *Malley*, 475 U.S. at 341. This formula serves the same goal as the common-law malice requirement, *id.*, and it is "analogous" (indeed, virtually identical) to what the exclusionary rule requires when a magistrate accepts a police officer's representation that probable cause existed, *id.* at 345; *compare United States v. Leon*, 468 U.S. 897, 922-23 & n.23 (1984). The qualified immunity defense also "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

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[4] Even if a bad faith requirement did apply here, petitioner has sufficiently alleged such malfeasance. *See* J.A. 69-71.

## II. The Due Process Clause Is Not a Better Foundation for Grounding "Malicious Prosecution" Claims Arising from Pretrial Detention

Respondents contend that instead of grounding claims such as these in unlawful pretrial detention, it would be better if pretrial "malicious prosecution" claims were treated as claims "that a prosecution should have ended earlier." Resp. Br. 41. And because "the Fourth Amendment does not grant a criminal defendant a right 'to judicial oversight or review of the decision to prosecute,'" respondents argue such claims must be housed, if at all, under the Due Process Clause. *Id.* 38 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)). Respondents' suggestions are misguided.

1. If there is any clear message from this Court's decision in *Albright v. Oliver*, 510 U.S. 266 (1994), it is that when a plaintiff alleging "malicious prosecution" under Section 1983 "was not merely charged" with a crime but was seized before trial, "it is the Fourth Amendment" under which his claim "must be judged." *Id.* at 271, 274 (plurality opinion); *see also id.* at 276-79 (Ginsburg, J., concurring). Justice Kennedy was more willing than the majority to entertain such a claim in due process terms. But he also agreed that insofar as the plaintiff chooses—as petitioner does here—to ground his claim in an allegation of detention without probable cause, the claim "must be analyzed under the Fourth Amendment without reference to more general considerations of due process." *Id.* at 281 (Kennedy, J., concurring in the judgment). That is why nearly every circuit besides the Seventh has long understood

that claims like petitioner's are properly grounded in the Fourth Amendment. *See* Petr. Br. 8 n.4 (citing cases).

Respondents' argument that petitioner's claim must be conceptualized as challenging "the propriety of the prosecution," Resp. Br. 51, instead of the lawfulness of his detention, barely so much as mentions *Albright*. In a lone footnote, respondents suggest the Court did not conceive of Albright's claim "as a malicious prosecution claim." Resp. Br. 46 n.10. But the court below had characterized it that way. *See Albright v. Oliver*, 975 F.2d 343, 347 (7th Cir. 1992) (holding that "malicious prosecution is not actionable as a constitutional tort"). So did Albright himself. *See* Petr. Br. 13, *Albright v. Oliver*, 510 U.S. 266 (1994) (No. 92-833) (likening claim to "an action for malicious prosecution"). The *Albright* plurality did too. *See* 510 U.S. at 270 n.4. And this Court later explained that a claim like Albright's should be viewed as "a Fourth Amendment malicious-prosecution suit under § 1983." *Wallace v. Kato*, 549 U.S. 384, 390 n.2 (2007).

It is hard to imagine more definitive guidance—at least as to whether claims such as Albright's and petitioner's should be viewed as "malicious prosecution" claims and analyzed under the Fourth Amendment.

2. None of this is to argue categorically that a pretrial detainee may never invoke the Due Process Clause to challenge "the propriety of [a] prosecution," Resp. Br. 51. Petitioner has not advanced such a claim and has no stake in its viability. *See* Petr. Br. 26. Petitioner's point is merely that if this Court needed to choose between the Fourth Amendment

and the Due Process Clause as the basis for bringing "malicious prosecution" claims arising from pretrial seizures, the Fourth Amendment would plainly be the proper choice.

It bears repeating once more that "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Albright*, 510 U.S. at 274 (plurality opinion); *see also Gerstein*, 420 U.S. at 125 n.27 ("The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for . the detention of suspects pending trial."). And as petitioner has explained in his opening brief and in Part I above, the Fourth Amendment provides well-established and easily administrable standards for adjudicating claims challenging the legality of pretrial detentions.

Shoehorning all such claims into the Due Process Clause, by contrast, would open up a Pandora's box of questions. If "at some juncture following an initial seizure, a criminal defendant's continued pretrial detention is due to the prosecution, rather than the initial arrest and probable-cause finding," Resp. Br. 38, it would first become necessary—as respondents recognize—to pinpoint where this constitutional transition occurs, *id.* 46-49. Respondents suggest the proper transition from the Fourth Amendment to due process would be "the defendant's first appearance before a magistrate," where the government must "commit[] itself to prosecute." *Id.* 46-47 (quotation marks and citation omitted). Yet if that is the case, one wonders why this Court suggested in *Gerstein*

that Fourth Amendment probable-cause determinations be made "at the suspect's first appearance before a judicial officer," 420 U.S. at 123, or why "many" jurisdictions today in fact require *Gerstein* findings at such hearings, NDAA Br. 6. If the Due Process Clause takes over the regulation of pretrial detentions once charges are recited at a first appearance, there is no work for the Fourth Amendment to do at such hearings. Contrary to this Court's directives and decades of settled practice, there would be no need under respondents' theory for magistrates at first appearances ever to make *Gerstein* findings.[5]

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[5] This case illustrates the point. According to the state-court docket sheet, the magistrate at petitioner's first appearance began by reciting the charge against him. Pet. Br. 5. If respondents are correct that the Due Process Clause took over at that point, there was no need for the magistrate to make any *Gerstein* finding, for the Fourth Amendment had ceased to apply once the hearing began. Put another way, if respondents' theory is correct, petitioner *never* had a viable Fourth Amendment claim to challenge his detention pursuant to the *Gerstein* finding because the Due Process Clause had taken over the regulation of his detention by that point anyway.

The same is true with respect to *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The County there "provide[d] probable cause determinations at arraignment for all persons arrested without a warrant," usually within 48 hours. *Id.* at 48. If respondents are correct that the Due Process Clause takes over once an arraignment is held, then there would have been no need for *Gerstein* findings at all during such hearings, and it is a mystery why this Court thought the hearings had to comply with the Fourth Amendment. *See id.* at 58-59.

What is more, if the Due Process Clause governs the legality of pretrial detentions beyond first appearances, then this Court will have to devise procedural safeguards and a standard of proof to govern such detentions. Respondents never offer any such methodologies, and there is no guarantee they would track those described in *Gertstein*. The nonadversarial procedures and probable cause standard described in *Gerstein* derive from the Fourth Amendment, *see* 420 U.S. at 120-21—the very provision respondents say does not apply. The Due Process Clause, by contrast, directs federal courts regulating state criminal procedure to consult not only tradition but also their own conceptions of "fundamental fairness." *Medina v. California*, 505 U.S. 437, 448 (1992) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)); *see also* Petr. Br. 30.

Under that test, the Constitution may well require at least some measure of adversarial process and magistrates to make some heightened finding—perhaps that it is more likely than not that the defendant will be found guilty—to justify prolonged detention pending trial. *See* Petr. Br. 30 n.9; *cf. Cooper v. Oklahoma*, 517 U.S. 348, 369 (1996) (Due Process Clause prohibits criminal defendants from standing trial if they are "more likely than not incompetent"). After all, the "root requirement" of due process is a meaningful opportunity to be heard before being deprived of a liberty interest, *Boddie v. Connecticut*, 401 U.S. 371, 329 (1971), and the harms that flow from erroneous deprivations of liberty in this context are quite profound, *see* Nat'l Ass'n for Public Defense Br. 3-8.

Finally, if a challenge to the legality of pretrial detention is necessarily a challenge to "the propriety of the prosecution," then identifying the proper defendants for such claims would become troublesome. The most natural defendants would seem to be the prosecutors who worked on the case. *See Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring). But prosecutors are absolutely immune for the actions of "initiating and pursuing a criminal prosecution." *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976). So unless someone besides prosecutors could be sued under the due process cause of action respondents imagine, respondents' argument is just a thinly veiled way of saying Section 1983 provides no relief whatsoever for unlawful pretrial detention. Could police officers be sued instead? Respondents never say, and the issue would be sure to perplex the lower courts, leading to contentious and extended litigation at the outset of every malicious prosecution case.[6]

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[6] As petitioner has noted, requiring all Section 1983 claims alleging unlawful pretrial detention to be grounded in the Due Process Clause would also require this Court to discern whether and how the rule of *Parratt v. Taylor*, 451 U.S. 527 (1981), applies in this context. As petitioner has explained, that rule should seemingly not apply because states already can and do provide hearings before detaining persons on criminal charges. Petr. Br. 33; *see also Albright*, 510 U.S. at 314 (Stevens, J., dissenting). On the other hand, if—as respondents seem to suggest (but never explicitly say), *see* Resp. Br. 53-54—*Parratt* would apply, then the basis for that holding would have to be that it is not "practicable for the State to provide a predeprivation hearing," *Parratt*, 451 U.S. at 543, before such detaining of suspects pending trial. *See also Zinermon v. Burch*,

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At bottom, this is not a hard case. Petitioner has alleged exactly the type of claim this Court in *Albright* and *Wallace* indicated should be brought to seek damages for unreasonable detention between the commencement of legal process and trial. He also filed that claim in a timely manner—within two years of the favorable termination of the criminal case against him. Petr. Br. 9. Indeed, virtually every federal court of appeals besides the Seventh Circuit has long determined that claims like petitioner's are viable. This Court should require the Seventh Circuit to follow the same basic rules everyone else already does.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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494 U.S. 113, 129 (1990). That would be a puzzling pronouncement in light of decades of experience to the contrary, and it would seemingly suggest that jurisdictions would no longer need to provide any contemporaneous means of challenging pretrial confinement.

Respectfully submitted,

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